

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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R&O CONSTRUCTION COMPANY,
Plaintiff,

v.

ROX PRO INTERNATIONAL GROUP,
LTD.; et al.,
Defendants.

2:09-cv-01749-LRH-LRL

ORDER

Before the court is defendant Real Stone Source, LLC's ("Real Stone") motion for reconsideration of the court's order granting in-part and denying in-part its motion for summary judgment on plaintiff R&O Construction Company's ("R&O") second amended complaint (Doc. #124¹). Doc. #126. R&O filed an opposition to the motion (Doc. #128) to which Real Stone replied (Doc. #129).

Also before the court is defendant Arizona Stone & Architectural Products NV, LLC's ("Arizona Stone") motion for reconsideration of the court's order granting in-part and denying in-part its motion for summary judgment (Doc. #123). Doc. #127. R&O filed an opposition (Doc. #130) to which Arizona Stone replied (Doc. #131).

¹ Refers to the court's docket number.

1 **I. Facts and Background**

2 This is a construction defect action. In September 2007, R&O entered into a contract with
3 non-party Home Depot to act as the general contractor for a Home Depot store in Las Vegas,
4 Nevada. R&O subcontracted the application of the required stone veneer to non-party
5 New Creation Masonry Inc. ("New Creation"). New Creation purchased the stone veneer from
6 defendant Arizona Stone. Defendant Real Stone acted as the distributor for the stone veneer and
7 also produced the installation guidelines. Allegedly, the stone veneer failed and R&O was forced to
8 make substantial structural repairs to the Home Depot store.

9 On September 3, 2009, R&O filed its initial complaint against defendants Arizona Stone;
10 Real Stone; Rox Pro International Groups, Ltd. ("Rox Pro"), the manufacturer; and WD Partners,
11 Inc. ("WD Partners"), the project architect. Doc. #1. R&O filed a first amended complaint on
12 February 5, 2010 (Doc. #22) and a second amended complaint on June 29, 2010 (Doc. #48). The
13 second amended complaint alleges ten causes of action: (1) implied warranty of merchantability -
14 Arizona Stone; (2) implied warranty of fitness for a particular purpose - Arizona Stone; (3) implied
15 warranty of merchantability - Real Stone; (4) implied warranty of fitness for a particular purpose -
16 Real Stone; (5) implied warranty of merchantability - Rox Pro; (6) implied warranty of fitness for a
17 particular purpose - Rox Pro; (7) express warranty - Real Stone and Rox Pro; (8) express warranty -
18 Arizona Stone, Real Stone, and Rox Pro; (9) negligent misrepresentation - WD Partners and
19 Real Stone; and (10) breach of contract - WD Partners. Doc. #48.

20 In response, both Real Stone and Arizona Stone filed motions for summary judgment (Doc.
21 ##77, 78 respectively) which were granted in-part and denied in-part by the court (Doc. ##124,
22 123). In the court's orders, the court granted defendants' motions as to all claims except for breach
23 of the implied warranty of merchantability - Arizona Stone (claim 1), breach of the implied
24 warranty of merchantability - Real Stone (claim 3), and negligent misrepresentation - Real Stone
25 (claim 9). *See* Doc. ##123, 124. Thereafter, defendants filed the present motions for
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1 reconsideration. Doc. ##126, 127.

2 **II. Discussion**

3 Defendants bring their motion for reconsideration pursuant to Fed. R. Civ. P. 59(e). A
4 motion under Rule 59(e) is an “extraordinary remedy, to be used sparingly in the interests of
5 finality and conservation of judicial resources.” *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d
6 887, 890 (9th Cir. 2000). Rule 59(e) provides that a district court may reconsider a prior order
7 where the court is presented with newly discovered evidence, an intervening change of controlling
8 law, manifest injustice, or where the prior order was clearly erroneous. FED. R. CIV. P. 59(e); *see*
9 *also United States v. Cuddy*, 147 F.3d 1111, 1114 (9th Cir. 1998); *School Dist. No. 1J, Multnomah*
10 *County v. AcandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

11 In their motions, defendants contend that there is newly discovered evidence that the
12 installation guidelines produced by Real Stone, distributed to Arizona Stone, and then provided to
13 New Creation with its purchase of the stone veneer have been subsequently approved by the Clark
14 County Building Commission as appropriate to adhere stone veneer to outside building walls in
15 Clark County, Nevada. *See* Doc. ##126, 126. Thus, defendants argue that based on this new
16 evidence, there is no longer any disputed issue of material fact as to whether the installation
17 guidelines were appropriate to adhere the stone veneer in this particular case. The court disagrees.

18 The court has reviewed the documents and pleadings on file in this matter and finds that
19 there are still disputed issues of fact concerning the appropriateness of the installation guidelines
20 which precludes summary judgment. Initially, the court notes that there is no legal support for
21 defendants’ proposition that because the Clark County Building Commission subsequently
22 approved the installation guidelines that the court must discount all other evidence presented on
23 this issue. Second, taking all the evidence before the court on this issue in the light most favorable
24 to R&O as the non-moving party for summary judgment, the evidence presented by R&O’s expert,
25 Dr. Paul W. McMullin (“Dr. McMullin”), establishes that the installation guidelines were only
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1 appropriate for fifteen (15) pound stones, not the twenty (20) pound stones that were used in the
2 project. Doc. #96, McMullin Decl., Exhibit 2. Further, for such heavy stones the installation
3 guidelines should have called for wall anchors in line with the international building code rather
4 than the use of mortar. *Id.* Thus, regardless of defendants' newly proffered evidence, there is still a
5 disputed issue of material fact concerning the appropriateness of the installation guidelines.
6 Accordingly, the court shall deny defendants' motions for reconsideration.

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8 IT IS THEREFORE ORDERED that defendants' motions for reconsideration
9 (Doc. ##126, 127) are DENIED.

10 IT IS FURTHER ORDERED that the parties shall have thirty (30) days from entry of this
11 order to file a proposed joint pre-trial order.

12 IT IS SO ORDERED.

13 DATED this 19th day of June, 2012.



LARRY R. HICKS
UNITED STATES DISTRICT JUDGE